Date Issued: May 23, 1995

Case No: 94-WPC-4

In the Matter of:

KEVIN JAMES,

Complainant,

v.

KETCHIKAN PULP COMPANY,

Respondent.

Appearances:

James W. McGowan, Esquire
329 Harbor Drive, Suite 201
Silka, Alaska 99835
For the Complainant

David H. Shoup, Esquire
Condon, Partnow & Sharrock
510 L Street, Suite 500
Anchorage, Alaska 99501
For the Respondent

Before: DANIEL J. ROKETENETZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This action arises from a complaint under employee (whistleblower) protection provisions of the Federal Water Pollution Control Act, 33 U.S.C. § 1367 et seq. (1988) (hereinafter also referred to as "the Act" or as commonly known "the Clean Water Act"). These provisions prohibit employers from discharging or otherwise retaliating against employees who have engaged in certain actions in furtherance of the Act's enforcement.

STATEMENT OF THE CASE

The Complainant, Kevin James (hereinafter also referred to as "Complainant"), filed a timely complaint on May 14, 1993 with the United States Department of Labor alleging discrimination by

Ketchikan Pulp Company (hereinafter also referred to as "KPC") in retaliation for activities within the scope of the Act's protection.

The Complainant contends that he was suspended and placed on leave with pay on November 20, 1992, and eventually discharged on April 19, 1993, after cooperating with EPA/FBI investigators, who conducted a search of the KPC facility in Ketchikan, Alaska on November 18 and 19, 1992, pursuant to search warrants. The Secretary of Labor, acting through a duly authorized agent, investigated the complaint and on March 4, 1994, determined that the Complainant had regularly engaged in activities protected under the Act and that his discharge resulted because of his having engaged in such protected activities. (AX 1)[1] On March 8, 1994, the Respondent requested a formal hearing to appeal the findings of the Secretary.

A formal hearing in this matter was conducted on July 18, 19, 20 and 21, 1994, in Ketchikan, Alaska, by the undersigned Administrative Law Judge. All parties were afforded full opportunity to present evidence as provided in the Act and the regulations thereunder.

[1] In this Recommended Decision and Order, "CX" refers to Complainant's Exhibit, "RX" refers to Respondent's Exhibit, "AX" refers to Administrative Exhibits, and "Tr." refers to the Transcript of the hearing.

ISSUES PRESENTED

1. Whether KPC took adverse employment action against the Complainant in violation of the employee protection provisions of the Clean Water Act.

2. Provided discrimination on the part of KPC is found, whether the Complainant is barred from relief when, after the discrimination, KPC discovered evidence of Complainant's wrongdoing that, in any event, would have led to the adverse employment action taken against him on lawful and legitimate grounds.

STIPULATIONS

Pursuant to my prehearing order, the parties were instructed to confer and prepare a stipulation of facts that are not in dispute. The parties submitted the following stipulations:

1. William Kevin James was hired by Ketchikan Pulp Company on June 24, 1988, to the position of stenciler.

2. Mr. James was suspended and placed on leave with pay on November 20, 1992.

3. Mr. James was discharged on April 19, 1993.

4. On May 14, 1993, Mr. James filed a complaint with the United States Department of Labor alleging discriminatory action by Ketchikan Pulp Company under the Clean Water Act.

5. Ketchikan Pulp Company is an employer subject to the Clean Water Act.

Based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT:

Extensive testimony was elicited from both sides at the hearing concerning the Complainant's employment history at KPC and the events leading up KPC's discharge of the Complainant. KPC is a wholly-owned subsidiary of Louisiana Pacific Corporation that is engaged in logging and pulp manufacturing in Alaska. (Tr. 17) The Complainant, Kevin James, was hired by KPC on June 24, 1988, to the position of stenciler. (Tr. 16)

On October 14, 1988, while working the pulp mill, the Complainant's arm became trapped for "a couple seconds" in a hydraulic iron used for sealing plastic wrapping. (Tr. 280; RX AV) The Complainant suffered third degree burns to his right hand and wrist. (RX AV) The Complainant also testified that his hand was crushed, but the medical documentation does not concur. (Tr. 280) The Complainant received medical treatment off and on for more than a year in Ketchikan. (RX AK)

On December 28, 1988, after recovering from his injury, the Complainant worked as a stenciler in the finishing room for "a couple months" and was assigned to the job of line trucking, which consisted of hauling pulp on forklifts to storage areas. (Tr. 25; RX M) The Complainant worked in line trucking for approximately nine months before his transfer to the KPC laboratory on September 15, 1989. (Tr. 25-26; RX M)

On December 8, 1989, the Complainant travelled to Salt Lake City, Utah for plastic surgery on his injured hand. He stayed in Salt Lake City from December 8, 1989 until January 14, 1990. He testified that he stayed at a bed and breakfast located in Sandy, Utah named "Beds and Boards" which was owned by his sister, Laura Preece. (Tr. 276-277) However, on cross-examination, the Complainant could not remember the rooms in which either he, his sister, or her three children slept or whether the house was two or three stories, despite the fact that he allegedly stayed at "Beds and

Board" for over one month. (Tr. 301-302) Also, the Complainant could not recall whether or not his brother-in-law, Steve Preece, was living at the house at that time or whether any other guests stayed at his sister's house during that time. (Tr. 295-298) I find the Complainant's testimony to be totally incredible on this issue.

The Complainant submitted requests for reimbursement totalling $3,689.82 to Alaska Timber Insurance Exchange (ATIE) for expenses incurred from lodging and meals in Salt Lake City during his trip there for plastic surgery. (CX 30) ATIE is the claims adjustor for KPC, who is self-insured. (Tr. 1130-1131) On June 26, 1991, ATIE reimbursed the Complainant $1,280.00, but refused to reimburse the him for lodging and meals in Salt Lake City for more than two days. ATIE policy dictates that reimbursement for travel expenses for medical treatment is available only to and from the nearest location where the required treatment is available. (CX 35; RX AW) Therefore, in the Complainant's case, only travel from Ketchikan to Seattle, Washington and the return trip was reimbursable. (Id.) The Complainant contested the reimbursement, continually maintaining that his $3,689.82 lodging bill was proper. (CX 34; RX T)

Upon his return to KPC in January, 1990, the Complainant continued to work in the lab, where he tested pulp samples for viscosity and brightness, and received on-the-job training. (Tr. 27-29) After six months, the Complainant began training and

testing for a lab assistant position to perform various product quality control tests as well as monitoring effluent waste water. (Tr. 26) On December 19, 1990, the Complainant was promoted to the "BOD" bench in the laboratory, where he primarily performed biological oxygen demand (BOD) tests in which effluent in the waste water from the pulp was measured for various chemical elements. (Tr. 32-33; RX M) Tests performed by the Complainant included examining pH, total suspended solids (TSS), and magnesium oxide (MgO). (Tr. 48) KPC's BOD, pH and TSS levels are regulated by the EPA under the Clean Water Act's NPDES permit system, which restricts the content of effluent waste water on daily and monthly bases.[2] (Tr. 35 & 82-83)

Prior to working in the KPC laboratory, the Complainant had not completed any relevant education that provided him with a background for working in a laboratory or for performing chemical tests. (Tr. 36) The Complainant testified that he just followed KPC's laboratory procedures. (Tr. 36) Furthermore, none of the Complainant's job duties required him to report his test findings to the EPA, but he told co-workers that it was his job to let the EPA know when the tests he performed were in violation of the permit. (Tr. 72; 689)

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[2] NPDES refers to the National Pollutant Discharge Elimination System under the Clean Water Act. 33 U.S.C. § 1342. As required by its NPDES permit, KPC regularly submits discharge monitoring reports (DMR) to the United States Environmental Protection Agency (EPA). (RX AT)

KPC chemical engineer, Kathleen French, described the sampling and testing procedure in the KPC laboratory. (Tr. 652-661) KPC maintains four separate effluent streams, where water used in production exits the facility. (Tr. 652) The four effluent streams are the filter plant, the main sewer, the primary and the secondary outfalls. (Id.) The filter plant and the main sewer are KPC outfalls 003 and 001 respectively, while the primary and secondary effluent stream are combined into outfall 002. (Id.) Three rounds of samples are taken every day from each of the outfalls. (Tr. 653) BOD personnel, such as the Complainant, take samples from the sampling stations located at each of the effluent streams. (Id.)

Next, the BOD personnel record the level of influent water, i.e., the amount of water brought into the plant over the prior 24 hours at the filter plant. (Tr. 655) Then the effluent amounts from the primary and secondary streams are recorded. (Id.) A standard amount of 2.4 million gallons per day is used as the filter plant outfall, thus leaving the amount of daily effluent from the main sewer as the only variable. (Tr. 656) From 1990-92 KPC was unable to accurately record the outgoing water from the main sewer because of its size (6 ft. diameter) and the fact that pieces of logs from production were sometimes released into the effluent stream and broke any measuring device that was in place. (Id.)

Once BOD personnel reported the flow numbers to French, she would calculate the number for the main sewer effluent by examining various factors such as: the previous 24-hour behavior, expectations for that day, and the historical data at her disposal. (Tr. 661) After the BOD personnel received the flow number from French, they would combine the individual pH number for each of the four effluent streams as related to the flows. Under the NPDES permit, KPC must submit a single outfall for each day on its discharge monitoring report (DMR); thus, lab personnel are required to combine the results from the effluent streams into a single outfall report. (Tr. 654; RX AT) BOD personnel, such as the Complainant, were then required to record the pH/flow relationship in the pH log sheet. (Tr. 663) French would later transfer the sampling results from the log sheets to the DMRs which were sent to the EPA. (Id.)

The Complainant regularly accused French of manipulating the flow results in a way to influence the outcome of the pH levels. (Tr. 109-110) French testified that the Complainant would often verbally attack her for providing what the Complainant believed to be manipulated figures. (Tr. 666) The Complainant testified that he suspected BOD co-worker Katy French of "fudging" volumes on reports on about fifty occasions. (Tr. 115) French vehemently denied ever manipulating figures and testified that the Complainant was the only KPC employee she knew that attempted to improperly influence the sampling results that were sent to the EPA. (Tr. 664-665) French testified that the Complainant would come in the lab

with sampling results that he believed to be in violation of the EPA permit and loudly pronounce that "we're going to catch them (KPC) today." (Tr. 662) French testified that pH levels varied greatly from day to day depending on what was happening in production and the amount of the effluent; thus, there was no way the Complainant could know at that particular stage of the testing whether KPC's effluents were in violation of the permit. (Tr. 657) Complainant told the EPA that he could tell from observing the pH chart at the main outfall when there might be a violation. (CX 46 at 4) The Complainant regularly accused French of manipulating the flow levels until autumn 1992, when a flume was installed in the main sewer effluent stream which provided a reliable number for the effluent from the main sewer. (Tr. 668)

The Complainant complained internally to several superiors at KPC about his concerns, including Clyde Johnson, Steve Hagan, Robert Higgins, Andy Kiander, Steve Gardner, French and others. (Tr. 117) The Complainant also accused his supervisors at KPC of attempting to convince him to "fudge" test results. (Tr. 84-85) However, the Complainant testified that no one specifically told him to change test results. (Tr. 89-91) Rather, his supervisors allegedly "encouraged" him to submit test results within the permit's limits. (Id.) The Complainant testified that he never changed the results from the tests he conducted. (Tr. 85) KPC presented a plethora of testimony from the Complainant's former co-workers and superiors that he regularly conducted tests improperly

and that he did not perform his job in accordance with KPC's NPDES permit. (See testimony of: Kathleen French, Tr. 665, 684-686; Jody Ayers, Tr. 755-768; Michael Doyle, Tr. 800-807; Russ Staska, Tr. 855-857; James Heimrich, Tr. 892-897; and Michael Barron, Tr. 955-960)

The Complainant also complained externally to the Sierra Club and the EPA. (Tr. 118) He testified that he provided the EPA with documents and samples in addition to being interviewed by EPA official Sandra Smith on at least three occasions. (Tr. 121-136; CX 46, 47, & 48) Additionally, at the request of the EPA and FBI, the Complainant conducted an interview with co-worker Frank Tellerico while wired with a recording device in order to elicit information regarding KPC laboratory practices and procedures. (Tr. 137)

On September 6, 1991 the Complainant was demoted back to pulp testing for failing to report a pH violation on September 2, 1991 and also because he allegedly was too slow in performing his job as a lab assistant. (Tr. 170, 955-958; CX 9H). KPC personnel director Michael Barron testified that the Complainant was demoted for ongoing problems in the lab, such as lack of cooperation with his superiors, intimidating co-workers, disruptive behavior, and excessive overtime billing caused by his inefficiency in completing his assignments during his normal shift. (Tr. 956) The Complainant was informed that he was "frozen", i.e., no possibility for advancement as a pulp tester and also that he was suspended for

three days. (Tr. 172; CX 9H) The Complainant testified that he tried to contact a superior to inform him that the pH test "broke", i.e., went beyond the permissible level. But, he discovered the problem after 5:30 P.M. and he allegedly could not reach anyone at work or at home. (Tr. 173-174) Barron testified that there is always a shift superintendent on duty who is in radio contact with the gate guard at all times. (Tr. 975) I find the testimony of KPC official Michael Barron to be credible and that legitimate justifications for the Complainant's demotion and suspension of September, 1991 were presented.

The evidence also indicates that the Complainant did not contact the EPA until after his demotion on September 6, 1991. Complainant's first interview with EPA criminal investigator Sandra Smith took place on September 29, 1991. (Tr. 121-123; CX 46) the Complainant was again interviewed by Smith on October 6, 1991. (CX 46) However, the Complainant testified that his first contact with the EPA was in November, 1991 when the Sierra Club put him in contact with the EPA. (Tr. 118-120) Complainant's testimony is inconsistent in this regard.

On September 25, 1992, the Complainant was suspended again for seven days for "dressing down" a supervisor and "intimidating" a co-worker. (Tr. 186) The Complainant admitted to loudly calling KPC environmental director Robert Higgins an "earthworm" in the presence of others because he observed Higgins smoking a pipe in

the lab, which was both against KPC's no-smoking policy and dangerous. (Tr. 190-194) Higgins testified that he had a pipe in his mouth, but he was not smoking. (Tr. 1049) Higgins also testified that the Complainant was screaming wildly and waving the KPC no-smoking policy in Higgins' face. (Tr. 1050). Higgins stated that the all laboratory personnel witnessed the Complainant's outburst. (Tr. 1050)

The Complainant testified that before the smoking incident on September 25, 1992, Higgins walked by him and stated that he knew Andrea Lowther's employer Kurt Halvorsen, thereby inferring that Higgins could have her fired. (Tr. 194) Lowther is Complainant's live-in girlfriend and she was fired from her job later that day. (Tr. 195) Higgins denied that this conversation with the Complainant ever took place. (Tr. 1050) Higgins testified that he knew Kurt Halvorsen, but that he never talked to him about Andrea Lowther and that he did not even know Lowther. (Tr. 1050-1051)

The Complainant admitted to making co-worker Jody Ayers cry when he told her that he was "sorry if you go to jail." (Tr. 188-189) The Complainant was attempting to get Ayers to talk to the EPA and support his allegations of KPC's Clean Water Act violations. Complainant later apologized to Ayers for "dragging her into this." (Tr. 188) Ayers complained to her supervisor, Andy Kiander, about the Complainant's intimidation. (Tr. 778) I find the testimony of Robert Higgins and Jody Ayers to be credible, and

the evidence presented indicates that the September, 1992 suspension of the Complainant was justified.

On November 18, 1992, EPA/FBI investigators raided the KPC facility at Ketchikan, armed with search warrants. (Tr. 197) The Complainant testified that he did not know about the raid before it happened. (Tr. 198) The Complainant returned to work at 3:00 P.M. on November 20, 1992 and shortly after arriving, was asked by Michael Barron to "come upstairs." (Tr. 200) Present in Clyde Johnson's office were Barron, Martin Chandler and a secretary. (Tr. 201) The Complainant testified that he was denied union representation. (Tr. 201) Barron informed the Complainant that he was suspended immediately, but the Complainant testified that he was not given a reason. (Tr. 202-203) The Complainant received two letters from KPC clarifying that he was suspended and placed on leave with pay until further notice. (Tr. 203-205; CX 1 & 2) The letters declared that the Complainant was suspended pending an investigation into "pertinent events." (Id.) Michael Barron testified that "pertinent events" included the KPC laboratory which was being investigated. (Tr. 970-971). Barron also testified that the Complainant was suspended for his own safety. (Tr. 970) Barron stated that many KPC employees were afraid that the plant might be closed and blamed the Complainant for the EPA involvement. (Id.)

Between November, 1992 and April, 1993, the Complainant went to KPC facilities "a couple times" to pick up his pay checks. (Tr. 206) Other employees informed the Complainant that KPC had hired an investigator who was asking them questions about the Complainant. (Tr. 206) In February 1993, investigators contacted the Complainant's father in Salt Lake City, Utah as well as the Complainant's former brother-in-law, Steve Preece. (Tr. 210-212) The Complainant contended that many other people in the Salt Lake City area were contacted by KPC investigators. (Tr. 213-214) The Complainant also testified that at this same time, an unidentified man was seen sorting through his garbage. (Tr. 213-214; CX 50)

On April 7, 1993, Clyde Johnson notified the Complainant that KPC had reason to believe that the Complainant engaged in insurance fraud by submitting falsified lodging bills relating to the plastic surgery on his hand performed in December 1989. (CX 3) An April 15, 1993 meeting was held with Clyde Johnson, Michael Barron, union steward Gary Bender, and the Complainant in attendance. (Id.) At the meeting, the Complainant offered no proof of payment for his lodging expenses at the Beds and Boards establishment. (Id.) On April 19, 1993, Clyde Johnson informed the Complainant that his employment with KPC was terminated immediately for the Complainant's submission of a falsified claim for reimbursement. (CX 4)

After the Complainant was discharged, KPC discovered that the he had falsified his original KPC employment application in many areas. (Tr. 333-384; RX A) The Complainant identified his ethnicity as Hispanic, although he is not. (Tr. 336) The Complainant explained that he thought Hispanic was the best choice to describe him because he is primarily Caucasian and part Native American. (Id.) The Complainant also listed his girlfriend, Andrea Lowther, as his wife and dependant and identified her as "Andrea James" on his application for worker's compensation and insurance purposes. (Tr. 335-340) The Complainant also incorrectly stated that he graduated from high school and that he had completed 60 hours of college credit, when actually, he received his general education diploma (GED) and only completed 27 hours of college credit. (Tr. 362; 377; RX AI & AF) Additionally, the Complainant misrepresented his prior work history and included his sister as a non-relative reference, claiming that he only knew her for ten years. (Tr. 354-359; 365-367)

CONCLUSIONS OF LAW:

Timely Complaint

KPC contends that because neither the Complainant nor his attorney objected to the November 20, 1992 suspension with pay at the time it was announced, the Complainant thereby waived his right to later object to that suspension. (Respondent's Pre-hearing

memorandum, at 6) KPC has failed to present any law in support of this contention, and I find the argument lacking in any legal merit.

KPC also argues that the Complainant failed to meet the time requirements of 29 C.F.R. § 24.3(b) in order to file a complaint regarding the November 20, 1992 suspension. (Respondent's Pre-hearing memorandum, at 6) Section 24.3(a) states that "[a]n employee who believes that he or she has been discriminated against by an employer . . . may file, or have another person file in their behalf, a complaint alleging such discrimination." 29 C.F.R. § 24.3(a) Section 24.3(b) requires that "[a]ny complaint shall be filed within 30 days after the occurrence of the alleged violation." 29 C.F.R. § 24.3(b) Thus, KPC contends that because the Complainant did not file his complaint until May 14, 1993, more than 30 days after the November 20, 1992 suspension, he thereby waived his right to file a complaint regarding that suspension.

The Supreme Court has stated that the period for filing a timely complaint begins to run "after the alleged unlawful employment practice notice of the challenged employment decision, rather than the time that the effects of the decision are ultimately felt." Delaware State College v. Ricks, 449 U. S. 250, 258 (1981) (Title VII claim) Shortly thereafter, the Court further held that when considering whether a complaint has been timely filed, "the proper focus is on the time of the discriminatory act,

not the point at which the consequences of the act become painful." Chardon v. Fernandez, 454 U. S. 6, 8 (1981) (§ 1983 claim) Therefore, under the so-called Ricks-Chardon rule, KPC's contention that in order to contest the November 20, 1992 suspension, the Complainant needed to file his complaint within 30 days of that date is valid.

However, I find that the November 20, 1992 suspension, which continued up to and including April 19, 1993 when the Complainant was discharged, constitutes a "continuing violation" which tolls the filing period until the day the suspension was lifted and the Complainant was discharged. In accord with the 4th Circuit, I find that:

> the Ricks-Chardon rule is premised on an employee's having been given final and unequivocal notice of an employment decision having delayed consequences. Only upon receipt of such notice does the filing period begin to run. Until that time, there is the possibility that the discriminatory decision itself will be revoked, and the contemplated action not taken, thereby preserving the pre-decision status-quo.

English v. Whitfield, 858 F.2d 957, 961 (1988) (Energy Reorganization Act claim)

During the suspension, which started on November 20, 1992 and continued until the Complainant was discharged on April 19, 1993, the Complainant was paid his full wage, and likely maintained the belief that he would be reinstated at some point in the future. The Complainant had been suspended twice before and thereafter reinstated by KPC. Also, the Complainant was given no indication in the November 20, 1992 suspension notice that he may later be discharged. KPC simply stated that he was "temporarily" suspended pending an investigation into "pertinent events." (CX 1)

I find that the suspension notice of November 20, 1992 was not a final and unequivocal notice of an adverse employment action and that the suspension of the Complainant constitutes a "continuing violation" which tolls the filing period. Therefore, I find that the complaint of May 14, 1993 was within 30 days of April 19, 1993 and timely filed under the requirements of 29 C.F.R. § 24.3(b).

Complainant's Prima Facie Case

The Clean Water Act's whistleblower provision states:

> No person shall fire, or in any way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or insti-

> tuted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter. 33 U.S.C. § 1367(a).

Under the Act's whistleblower provision, the Complainant must prove, by a preponderance of the evidence, that (1) he was an employee of the party charged with the discriminatory action; (2) he was engaged in a protected activity under the Clean Water Act: (3) the employer took an adverse action against him; and (4) the evidence created a reasonable inference that the adverse action was taken because of his participation in the statutorily protected activity. Passaic Valley Sewerage Commrs. v. U. S. Dept. of Labor, 992 F.2d 474, 480-81 (3rd Cir. 1993); see also Mackowiak v. Univer. Nuclear Systems, Inc., 735 F.2d 1159, 1162 (9th Cir. 1984) (whistleblower action under Reorganization Act).

Employee and Employer:

The parties are in agreement that the Complainant is an employee and that KPC is an employer for purposes of the whistle-blower provision of the Act. As "employee" and "employer" have been interpreted broadly under various federal whistleblower provisions, I find likewise. In the Matter of William Wood, et al., No. 79-ERA-3, slip op. of ALJ at 8, adopted by SOL (Nov. 8, 1979) (every employee considered an enforcer of the law and

protected from reprisal for reporting violations); United States ex rel. Kent v. Aiello, 836 F.Supp. 720, 725 (E.D. Cal. 1993) (term "employer" has the widest of readings when used in federal statutes).

Protected Activity

Evidence was presented that the Complainant communicated with EPA officials on several occasions in 1992, as well as continually threatening to report KPC's alleged Clean Water Act violations. (CX 46, 47, 48) Whistleblower provisions are intended to promote a working environment in which employees are free from threats of employment reprisals for publicly asserting company violations of statutes protecting the environment, such as the Clean Water Act. Passaic Valley Sewerage Commrs. v. U. S. Department of Labor, 992 F.2d 474, 478 (3rd Cir. 1993). Such provisions are intended to encourage employees to aid in the enforcement of such statutes by raising substantiated claims through protected procedural channels. (Id.)

KPC contends that the Complainant is not entitled to the Act's protection for two reasons. First, KPC argues that the Complainant is not entitled to protection under the Clean Water Act's whistle-blower provisions because he deliberately violated that Act himself. (Respondent's Pre-hearing memorandum, at 2) While KPC presented extensive evidence regarding the Complainant's lackadai-

sical attitude toward his testing responsibilities as a KPC lab employee, they have not conclusively proven that the Complainant deliberately violated the Clean Water Act, and as a result, is not prohibited from seeking protection under the Act for KPC's allegedly discriminatory conduct.

Second, KPC contends that the Complainant is not entitled to the Act's protection because his contact with the EPA was in retaliation for his suspension and demotion on September 6, 1991. (Respondent's Pre-hearing memorandum, at 3) KPC cites to Wolcott v. Champion Int'l Corp., 691 F.Supp. 1052 (W.D. Mich. 1987), in support of this proposition. I find KPC's reliance on Wolcott to be misplaced. In Wolcott, the District Court found that the employee attempted to extort his employer by threatening to report OSHA violations if he and his friends were denied jobs. Wolcott, at 1063. The court stated that the whistleblower statute is not intended to serve as a means for employee extortion of his employer or as an offensive weapon for disgruntled employees. (Id., at 1064-1066) Furthermore, the court found that the employee's reports to the Michigan Department of Labor were "a laundry list of gripes, not violations of law." (Id., at 1063)

As discussed above, the Complainant engaged in protected activity both before and after his September 6, 1992 demotion. While the evidence presented does indicate that the Complainant's first contact with the EPA did not occur until after his September

6 demotion, timing alone is not sufficient to prove a retaliatory motive on the part of the employee. Furthermore, the evidence indicates that the Complainant regularly reported his beliefs regarding Kathleen French's alleged misconduct concerning the NPDES permit to his superiors and threatened to contact the EPA to report such alleged violations. These internal complaints preceded his September 6, 1991 demotion, and such complaints have been held to constitute protected activities. Mackowiak v. Univ. Nuclear Systems, 735 F.2d 1159, 1163 (9th Cir. 1984)

Additionally, no evidence was presented by KPC that the Complainant attempted to extort his employer before contacting the EPA. The Complainant's allegations to the EPA were seemingly justified as evidenced by the EPA/FBI raid on KPC facilities shortly after communications between the Complainant and those agencies.[3] I find that KPC's reliance on Wolcott as a bar to the Complainant's use of the Clean Water Act's employee protection provision is without merit. Many of the Complainant's alleged protected activities occurred before the September 6 demotion and I do not find that the Complainant's alleged protected activities, as a whole, to be in retaliation for his September 6 demotion.

[3] The EPA did not permit criminal investigator Sandra Smith to testify at the hearing in the case at bar. (AX 34) Therefore, the veracity and usefulness of the information provided to the EPA by the Complainant is unknown. However, it is reasonable to assume, based on timing alone, that the Complainant's communications with the EPA were in some way used by the EPA and/or FBI in preparation for the raid on KPC facilities in November 1992.

There can be little doubt that the Complainant's cooperation with the EPA and FBI, leading up to the raid and search of KPC's facilities, as well as his prior internal complaints and threats, both satisfy the Act's requirements for protected activities. An employee's cooperation with a government investigation has been found to be a protected activity under the Clean Water Act. Simon v. Simmons Foods, Inc., ___ F.3d ___, Case No. 94-2421 (8th Cir. Feb. 27, 1995) Therefore, I find that the Complainant is eligible for protection under the Clean Water Act's whistleblower provision and has proven that he was engaged in protected activities prior to his suspension by KPC on November 20, 1992.

KPC's Knowledge of Complainant's Protected Activities:

Evidence was presented that KPC knew of the Complainant's cooperation with EPA officials prior to the November 18-19, 1992 raid. KPC process engineer Kathleen French testified that the Complainant often told laboratory co-workers that it was his job to tell the EPA when the tests indicated a violation of the permit. (Tr. 689) In addition, KPC personnel manager Michael Barron testified that the Complainant's co-worker informed him that the Complainant was talking to the EPA and tried to force her to do likewise. (Tr. 993) Also, on October 5, 1992, Michael Barron searched the Complainant's bag as he was leaving the KPC facility after being informed by Jim Heimrich that the Complainant was seen near the clarifier. (Tr. 987) Complainant admitted to taking

sludge samples that day and turning them over to the EPA. (CX 47 & 48) The company also was aware that its employees would be interviewed by EPA/FBI investigators during their search of KPC's facilities. (CX 54) KPC circulated a memorandum to its employees on November 19, 1992 advising employees of their right "not" to talk to the EPA/FBI investigators. (Id.)

Thus, whether or not KPC knew of each contact between the Complainant and the EPA, it nonetheless was aware of Complainant's activities with and relating to the EPA. I therefore find that KPC had actual knowledge of the Complainant's protected activities under the Act.

Adverse Employment Action:

The adverse employment action which is the basis for this complaint is the suspension of Complainant's employment with KPC on November 20, 1992. The parties have stipulated to this suspension date and the fact that KPC took adverse employment action against the Complainant, for whatever reason, is not disputed.

Causal Relationship:

The evidence presented demonstrates that the Complainant's intent to report KPC to the EPA and his cooperation with EPA criminal investigators, at the very least, played a role in KPC's

suspension of the Complainant on November 20, 1992. The Complainant was suspended, albeit with pay, on the day following the surprise EPA/FBI raid on KPC facilities and remained on suspension until reasons were discovered which lawfully justified his discharge. The Complainant's prior communications with the EPA and the evidence he provided likely played a part in the EPA's and FBI's ability to secure a search warrant for KPC's facilities in Ketchikan, Alaska. Following the search, these same communications between the Complainant and the EPA were likely the underlying motivation for the November 20, 1992 suspension and April 19, 1993 discharge of the Complainant.

In the absence of direct evidence of a causal relationship between the protected activity and subsequent adverse employment action, it is well established, in the Ninth Circuit and elsewhere, that the causation element of the prima facie case may be proven with circumstantial evidence. Mackowiak, at 1162; see also Ellis Fischel State Cancer Hospital v. Marshall, 629 F.2d 563, 566 (8th Cir. 1980). For example, the proximate timing of the protected activity and the discriminatory treatment may be sufficient to raise the inference of causation. Couty v. Dole, 886 F.2d 147, 148 (8th Cir. 1984) (proximity in time between the protected conduct and adverse action alone is sufficient to establish causation). KPC's suspension of the Complainant occurred on November 20, 1992, one day after the raid on KPC facilities by EPA/FBI investigators with whom the Complainant had cooperated. I find this proximity

sufficient to raise an inference that KPC's suspension of Complainant on November 20, 1992 was motivated, at least in part, by the Complainant's protected activities. As a result, I find that the Complainant has established a prima facie case of discrimination under the Clean Water Act.

Rebuttal of the Prima Facie Case

Once the Complainant satisfies his prima facie case, the burden shifts to KPC to produce evidence of the existence of a legitimate, non-discriminatory reason for the adverse employment action taken against the Complainant. St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993). To carry its burden, KPC must only produce evidence of some legitimate grounds for the November 20, 1992 suspension of the Complainant.

KPC presented evidence that its decision to suspend the Complainant on November 20, 1992 was based on concerns for the Complainant's own safety pending an investigation into "pertinent events." (Tr. 970) The investigation included the laboratory and the reasons for the EPA raid. (Id.) Therefore, the asserted grounds for KPC's discharge of the Complainant, if credited, constitute legitimate and non-discriminatory grounds for the adverse action taken against the Complainant. However, the finding of some legitimate grounds entails no credibility assessment at this stage of the proceedings. St. Mary's Honor Center,

Supra, at 2748. Therefore, I find that KPC has successfully carried its burden of production in presenting a legitimate, non-discriminatory reason for the suspension of the Complainant's employment with KPC on November 20, 1992.

Dual Motive:

Having found that illegal motives, at the very least, "played a role" in the Complainant's suspension and also that KPC presented legitimate reasons for suspending the Complainant, the issue of a "dual motive" arises. The "dual motive" test was devised by the U. S. Supreme Court in Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977) and has been held to apply to the whistleblower provisions of the Clean Water Act. Fogue v. U. S. Dept. of Labor, 940 F.2d 1287, 1289 (9th Cir. 1991). The "dual motive" test requires that when both discriminatory and non-discriminatory reasons for the adverse employment action have been presented, the employer must prove, by a preponderance of the evidence, that it would have taken such action against the employee "even if" the protected activity had not occurred. Simon v. Simmons Food, ___ F.3d ___ , Case No. 94-2421 (8th Cir. Feb. 27, 1995) (Clean Water Act whistleblower); Mackowiak v. Univer. Nuclear Systems, Inc., 735 F.2d 1159, 1162 (9th Cir. 1984). The additional burden is placed on KPC because "the employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that (it) bear the risk that the influence of legal and illegal

motives cannot be separated because . . . the risk was created by (their) own wrongdoing." Mackowiak, at 1164 (quoting NLRB v. Transportation Management Corp., 462 U.S. 393, 403 (1983).

As justification for the November 20, 1992 suspension of the Complainant, KPC cannot rely on the reasons given for the Complainant's discharge on April 19, 1993. The Complainant's dishonesty in completing his employment application as admitted to by the Complainant (Tr. 259 and RX A, D, & E) and his fraud in submitting falsified bills for reimbursement following his recovery from a hand injury (RX T & W) were not discovered until after the November 20, 1992 suspension. Therefore, these justifications are immaterial when determining the reason behind the November 20, 1992 suspension of the Complainant.

Even without considering the Complainant's application and insurance fraud, the evidence indicates that the Complainant was a difficult employee who often caused problems at the workplace. Even when an employee has engaged in protected activities, he may nonetheless be disciplined, including termination of employment, for insubordinate and disruptive behavior. Dunham v. Brock, 794 F.2d 1037, 1041 (5th Cir. 1986). KPC presented substantial evidence of the Complainant's stormy employment history with KPC. Prior to the November 20, 1992 suspension with pay, the Complainant had received verbal and written warnings concerning his job performance and actions, and also had been suspended twice and

demoted. (Tr. 968) Thus, I find that the evidence proved that the Complainant created substantial friction in his relations with co-workers and superiors. (CX 9H; RX X; RX AC).

Nevertheless, KPC failed to produce evidence of the Complainant's insubordinate or disruptive behavior on or about November 20, 1992, the date of his suspension. KPC also failed to present persuasive evidence that the Complainant's conduct leading up to November 20, 1992 justified a five-month suspension. Additionally, I find KPC's stated reasons for suspending the Complainant unpersuasive. Other than the testimony of Michael Barron, KPC presented no evidence that the Complainant's safety would be in danger if he continued to work at KPC after November 20, 1992. Likewise, KPC did not adequately articulate its reasons why the Complainant needed to be under suspension during the investigation into "pertinent events." I find that KPC's stated reasons for the November 20, 1992 suspension of the Complainant to be mere pretexts for discrimination. As a result, KPC has not proven, by a preponderance of the evidence, that it would have suspended the Complainant on November 20, 1992 even if he had not cooperated with the EPA investigation. Therefore, I find that KPC's suspension of the Complainant on November 20, 1992 to be in violation of the employee protection provision of the Clean Water Act and damages will be awarded accordingly.

Damages and Remedy

Even where KPC is found to have discriminated against the Complainant for his whistleblowing activities, after-acquired evidence of the Complainant's wrongdoing may be used by KPC to discharge the Complainant on lawful grounds. Following the November 20, 1992 suspension, KPC discovered substantial evidence that justified the Complainant's discharge under KPC's Rules of Conduct. Such evidence indicated that the Complainant had fraudulently submitted bills for reimbursement relating to the plastic surgery performed on his right hand in Salt Lake City in December 1989. (Tr. 1102-1103) KPC Rules of Conduct state that employee dishonesty may result in discharge. (RX AD) Also, KPC industrial relations manager Clyde Johnson testified that another KPC employee had been discharged for submitting fraudulent claims. (Tr. 1109-1110) An employer who learns about employee misconduct that justifies a legitimate discharge is not required to ignore the information, "even if it is acquired during the course of discovery in a suit against the employer and even if the information might have gone undiscovered absent a suit." McKennon v. Nashville Banner Publishing Co., ___ U.S. ___, Case No. 93-1543, 1995 LEXIS 699, at 19 (Jan. 23, 1995). Therefore, in light of the evidence discovered by KPC regarding the Complainant's insurance fraud, I find that KPC lawfully terminated the employment of the Complainant on April 19, 1993.

Evidence of the Complainant's wrongdoing, however, does not absolve KPC of its discriminatory conduct under the Act. While evidence of the Complainant's misconduct may be supervening grounds for his discharge, it does not obviate the fact that the Complainant was suspended because of his protected activities. The recent U. S. Supreme Court decision in McKennon v. Nashville Banner Publishing Co., supra, supplies the framework for formulating damages in a case involving an employee discriminated against for his protected activity and an employer who thereafter discovers legitimate, non-discriminatory reasons for the employee's discharge.

Justice Kennedy, writing for a unanimous Court, declared that the employee's remedy "should be a calculation of backpay from the date of the unlawful discharge to the date the new information was discovered . . . [and that] neither reinstatement nor front pay is an appropriate remedy" (Id.) Therefore, under this formula, the monetary remedy available to the Complainant in is the amount of backpay from the time of his discharge until the time KPC could lawfully discharge him. In this case, however, the employer suspended Complainant "with pay" and did not discharge him until the discovery of misconduct that justified a discharge. Thus, because the Complainant suffered no loss of wages during his suspension, I find that the Complainant is not entitled to any monetary relief, in the form of back or front pay, or reinstatement.

However, I feel I must address the actions of KPC in searching for evidence of misconduct by the Complainant. KPC's extensive search into the Complainant's background, which included the use of private detectives and interviews with co-workers, and continued even after the Complainant was discharged, has created an atmosphere of apprehension and has produced a substantial chilling effect on future KPC employee cooperation with government investigators. While applicable law does not permit me to award the Complainant monetary relief from KPC's discriminatory treatment because of his own misconduct, I nonetheless may otherwise order affirmative action as a means of deterrence of future illegal conduct by KPC. Compensation for injuries caused by prohibited discrimination is an object of the whistleblower statutes, but deterrence is another. McKennon v. Nashville Banner Publishing Co., supra; see also Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-418 (1975) (whistleblower statutes designed to force employers to eliminate discrimination).

The Clean Water Act's whistleblower provision and other similar federal provisions share a broad, remedial purpose of protecting workers from retaliation based on their concerns for safety and quality. Donovan v. Stafford Construction Co., 732 F.2d 954, 960 (D.C. Cir. 1984). Therefore, employees must be allowed to work in an atmosphere where communication with government agencies is permissible without fear of employment reprisal. I find that KPC's treatment of the Complainant, through its retalia-

tory action and search into his past, has destroyed the atmosphere of permissible communication with the government at KPC's facilities. I therefore order affirmative action to effectuate the purposes of the Clean Water Act and to deter future misconduct by KPC in the form of plantwide posting of anti-discrimination orders at KPC's Ketchikan facility, as well as plantwide posting of explicit notices incorporating guidance for employees regarding avenues of complaint concerning possible violations of federal labor and environmental statutes by KPC. Notices informing employees of their rights are appropriate remedies in order to protect KPC's current and future employees from repetition of the discriminatory practices discussed in this Recommended Decision and Order. Donovan v. Freeway Constr. Co., 551 F.Supp. 869, 879-82 (D.R.I. 1982)

In evaluating the entire record, I conclude that the weight of the evidence demonstrates that KPC violated the employee protection provisions of the Federal Water Pollution Control Act, 33 U.S.C. § 1367, et seq., in suspending the Complainant on November 20, 1992 due, at least in part, due to his engaging in activities protected by the Act. I also conclude that evidence later discovered gave KPC legitimate grounds for discharging the Complainant on April 19, 1993.

Attorney's Fees

The Clean Water Act provides that whenever an order is issued to abate a violation of the Act, reasonable attorney's fees incurred by the Complainant in connection with the institution and prosecution of a proceeding under the Act shall be assessed against the person committing such violation. 33 U.S.C § 1367(a); 29 C.F.R. § 24.6(b)(3). Therefore, I hereby recommend that reasonable attorney's fees be awarded to the Complainant and assessed against KPC.

RECOMMENDED ORDER

IT IS RECOMMENDED that the Respondent, Ketchikan Pulp Company, be ORDERED to post and display prominently at its principal office and situs of each employee time-clock continuously for a duration of one-hundred and eighty (180) days a copy of the notice appended hereto as Appendix A.

_____

DANIEL J. ROKETENETZ

Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Office of Administrative Appeals, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., N.W., Washington, DC 20210. The Office of Administrative Appeals has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See 55 Fed. Reg. 13250 (1990).

APPENDIX A

Notice to all employees of Ketchikan Pulp Company.

1. An employer is prohibited from firing, suspending, harassing or otherwise discriminating against any worker who complains to the employer and/or federal, state or local government agencies about environmental, health, safety, or other hazards being created by the employer.

2. On November 20, 1992, an employee was suspended for five months for cooperating with an Environmental Protection Agency and Federal Bureau of Investigation (FBI) investigation into Ketchikan Pulp Company's alleged violations of the Water Pollution and Control Act.

3. The Department of Labor ordered Ketchikan Pulp Company to post these notices and to stop harassing and/or discriminating against employees who complain about such hazards.

4. If Ketchikan Pulp Company is creating any such hazards, you may call the Department of Labor, the Environmental Protection Agency,

the Occupational Safety and Hazard Administration, or any other government agency.

This notice is posted per order of the U. S. Department of Labor.